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No. 84-518, No. 84-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.,
Respondents.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR ROBERT W. JOHNSON, ET AL.

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The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED

Does the federal civil service retirement statute, 5 U.S.C. § 8335(b), which, in part, authorizes involuntary retirement of *federal* firefighters at age 55, establish *as a matter of law* that age 55 is a bona fide occupational qualification under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, for *non-federal* firefighters nationwide?

PARTIES TO THE PROCEEDINGS BELOW

Robert W. Johnson, August T. Stern, Jr., Thomas C. Doyle, Mitchell Paris, Robert L. Robey, James Lee Porter, and the Equal Employment Opportunity Commission were Appellees in the proceedings in United States Court of Appeals for the Fourth Circuit and are Petitioners here. Mayor and City Council of Baltimore was the Appellant in the proceedings in the United States Court of Appeals for the Fourth Circuit and is the Respondent here. Hyman A. Pressman, Chairman, and Donald D. Pomerleau, Calhoun Bond, Edward C. Heckrotte, Sr., Charles Daugherty, Paul C. Wolman, Jr., and Curt Heinfelden, members of the Board of Trustees, Fire and Police Employees Retirement System of the City of Baltimore, were Defendants in the proceedings in the United States District Court for the District of Maryland, and did not appeal from that decision.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 731 F.2d 209, rehearing *en banc* denied, 731 F.2d 209 (4th Cir. 1984). The opinion of the United States District Court for the District of Maryland is reported at 515 F. Supp. 1287 (D. Md. 1981).

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1984. Rehearing *en banc* was denied on June 30, 1984. The petitions for certiorari were filed on September 27, 1984 (No. 84-518) and November 2, 1984 (No. 84-710), within the period for filing as extended by the Court. Both petitions were granted on January 14, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

The relevant provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, the Federal Civil Service Law, Government Organization and Employees, Chapter 83 — Retirement, 5 U.S.C. § 8335, and the Fire and Police Employee Retirement System of the City of Baltimore, Baltimore City Code, Article 22, Section 29, *et seq.*, are set forth in Appendix C of Petition for Certiorari in 84-518, at 43a-47a.

STATEMENT OF THE CASE

The Fire and Police Employee Retirement System of Baltimore City, Article 22, § 34(a)(2) and (4) of the Baltimore City Code (hereinafter referred to as "FPERS"), mandates the retirement of all firefighting personnel, below the rank of Lieutenant, at ages 55 and 60, depending on the date they entered the department service and the number of years that they have been in the service. (J.A. 3).[1] Lieutenants and other fire officers may work until age 65. (J.A. 3). In addition, firefighters hired prior to 1962 who chose to remain in the existing Employees Retirement System of the City of Baltimore,

[1] "J.A." refers to Joint Appendix. "R" refers to the Record in the United States District Court for the District of Maryland. "Johnson Pet." refers to the Petition for Certiorari in 84-518.

Article 22, § 3(f) Baltimore City Code (hereinafter referred to as "ERS"), may remain in the department service and continue working as firefighters until age 70. (J.A. 4). Petitioners, six Baltimore City firefighters, brought this action in the United States District Court for the District of Maryland, challenging this mandatory retirement provision under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (hereinafter referred to as "ADEA") and the Fourteenth Amendment to the United States Constitution (Johnson Pet. 19a). Federal jurisdiction was conferred pursuant to 29 U.S.C. §§ 626(b), 217. Petitioner, Equal Employment Opportunity Commission (hereinafter referred to as "E.E.O.C.") intervened in support of the plaintiffs. (Johnson Pet. 19a).

The ADEA specifically prohibits mandatory retirement prior to age 70. 29 U.S.C. § 623(f)(2). Respondents, Mayor and City Council of Baltimore, et al. (hereinafter referred to as "the City"), asserted the bona fide occupational qualification exception (hereinafter referred to as "BFOQ"), 29 U.S.C. § 623(f)(1), established under the ADEA in support of its mandatory retirement age requirements. (Johnson Pet. 24a, 28a-39a). A non-jury trial was held before the Honorable Alexander Harvey, II, United States District Judge. Detailed and exhaustive expert testimony and other evidence was presented at the six-day trial on the BFOQ issue, to determine whether it was impossible or highly impractical to deal with the retirement of firefighters between ages 60 and 65 on an individual basis. (Johnson Pet. 28a-39a).

On June 9, 1981, the district court issued its decision rejecting the City's BFOQ defense and concluding that the City Ordinance violated the ADEA. (Johnson Pet. 18a-41a). Applying the two-prong test established in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976), and adopted by the Fourth Circuit in *Arritt v.*

Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977), the District Court found that the six plaintiff firefighters could safely and efficiently perform their jobs beyond age 60, or that the City, through testing, could identify those who were unfit. *Johnson v. Mayor and City Council of Baltimore*, 515 F. Supp. 1287, 1300-01 (D. Md. 1981). (Johnson Pet. 39a).

The City filed an appeal with the United States Court of Appeals for the Fourth Circuit.[2] A divided panel of the Fourth Circuit reversed the "thorough and impeccably reasoned opinion" of the court below. *Johnson v. Mayor and City Council of Baltimore*, 731 F.2d 209, 213 (4th Cir. 1984). (Johnson Pet. 7a). The panel majority did not disagree with the district court's finding that firefighters could safely and efficiently perform their jobs beyond age 60, or that those who are unfit could be identified through testing. Rather, relying on this Court's language in *E.E.O.C. v. Wyoming*, 460 U.S. 226, 240 (1983), where the Court held that the state's discretion in imposing a mandatory retirement age is merely being tested "against a reasonable federal standard," the majority stated that it "must initiate a search for a 'reasonable federal standard' by which to test whether age is a BFOQ for the City of Baltimore's firefighters." 731 F.2d at 212 (Johnson Pet. 5a). The majority found the standard to be embodied in a United States civil service statute, 5 U.S.C. § 8335(b), "mandating retirement as a general matter at fifty-five for federal police and firefighting employees." 731 F.2d at 212-13 (Johnson Pet. 5a). Under this statute, federal firefighters and law enforcement officers, nevertheless,

[2] The City also filed in this Court a Petition for Writ of Certiorari to review the judgment of the United States District Court for the District of Maryland before judgment in the Court of Appeals because of the Constitutional issues then pending before this Court in *EEOC v. Wyoming*, 514 F. Supp. 595 (D. Wyo. 1981), *rev'd* 460 U.S. 226 (1983). This Court denied certiorari, 455 U.S. 944 (1983).

may continue working beyond age 55 if they have less than twenty years of service or if their agency head determines that the public interest requires their continued employment. Contrary to the circuit court's direction that the BFOQ exception to the ADEA be adjudicated on a case-by-case basis, the majority concluded that "Congress' own reasonable federal standard" of age 55 as the mandatory retirement age for federal firefighters, establishes as a matter of law that age 55 is a BFOQ under the ADEA for all non-federal firefighters nationwide. 731 F.2d at 213 (Johnson Pet. 7a).

Chief Judge Winter dissented. He explained that neither the language nor the legislative history of 5 U.S.C. § 8335(b) supports the majority's conclusion that Congress, in establishing 55 as the mandatory retirement age for federal firefighters, intended to set age 55 as a BFOQ or determined that age 55 constituted a BFOQ (Johnson Pet. 14a). Furthermore, referring to footnote 17 of the *Wyoming* decision, Chief Judge Winter stated that "*Wyoming* . . . tells us that the broad requirements of ADEA are not to be constricted as a matter of law by what treatment Congress has afforded to comparable federal employees." (Johnson Pet. 15a). Thus, Chief Judge Winter concluded that the fact that Congress requires some federal firefighters to retire at 55, does not excuse Baltimore from proving facts necessary to establish a BFOQ under 29 U.S.C. § 623(f)(1) of the ADEA. (Johnson Pet. 15a).

Petitioners filed a Petition for Rehearing with Suggestion for Rehearing *En Banc*. On June 29, 1984, a divided (6-3) Fourth Circuit denied Petitioners' request for rehearing. (Johnson Pet. 17a)

SUMMARY OF ARGUMENT

The federal civil service retirement statute, 5 U.S.C. § 8335(b), which authorizes the involuntary retirement of

federal firefighters at age 55, does not establish, as a matter of law, that age 55 is a BFOQ under the ADEA for non-federal firefighters nationwide. The Fourth Circuit's conclusion finding such a *per se* BFOQ is totally misplaced.

1. An employer may justify the imposition of a specific mandatory retirement age under the BFOQ exception to the ADEA *only* if it can prove, through factual evidence, (1) that the BFOQ which it seeks to invoke is reasonably necessary to the essence of the business, and (2) that all or substantially all employees over the mandatory retirement age are unable to perform the duties of the job involved safely and efficiently, or that it is impossible or impractical to deal with persons over the age limit on an individual basis. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 234, 236 (5th Cir. 1976). This factual analysis is necessary in every case where an employer asserts age as a BFOQ, regardless of whether the occupation under scrutiny is hazardous or involves public safety.

2. In *E.E.O.C. v. Wyoming*, 460 U.S. 226, 240 (1983), the Court explained that under the ADEA the state's discretion in achieving its goals is merely being tested against a "reasonable federal standard." Contrary to the conclusion of the Fourth Circuit, there is no need to search other federal statutes to find some "reasonable federal standard" against which to scrutinize the age-based decision. The "reasonable federal standard" referred to by this Court is the *BFOQ* requirement established by Congress under the ADEA, and that Act requires a factual analysis of each case under the established two-prong BFOQ test.

This Court, in *Wyoming*, rejected the Fourth Circuit's conclusion that 5 U.S.C. § 8335(b), the federal civil service retirement statute setting age 55, in most instances, as the mandatory retirement age for federal firefighters and

law enforcement officers, establishes age 55 as a *per se* BFOQ for all non-federal firefighters and law enforcement officers. The occupation involved in *Wyoming* was state game wardens who are defined in the Wyoming statutes as "law enforcement officers." This Court, however, rejected Wyoming's argument that § 8335(b) established age 55 as a BFOQ for its employees, explaining that the requirements of the ADEA are not to be constricted as a matter of law "by the fact that the federal government happens to impose mandatory retirement on a small class of its own workers." 460 U.S. at 242-43 n.17.

3. Neither the text nor legislative history of 5 U.S.C. § 8335(b) supports the conclusion that age 55 is a BFOQ even for federal firefighters. Mandatory retirement schemes approved by Congress for federal employees are not subject to the strict requirements of the ADEA. These provisions only need be *rationally related* to a permissible government objective. *Vance v. Bradley*, 440 U.S. 93 (1979). In contrast, compulsory retirement schemes for state and local government employees must be rationally related *and* "reasonably necessary" to the operation of the particular business in a question to pass muster under the ADEA. *Orzel v. City of Wauwatosa*, 697 F.2d 743 (7th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 484 (1984).

Under 5 U.S.C. § 8335(b), federal firefighters are not necessarily required to retire at age 55. A firefighter may continue to work beyond that age if he has less than twenty years of service, if his agency head chooses to retain him, or if his agency head fails to give him the requisite 60 days' notice of separation. This statutory scheme "makes it impossible to say that there is a federally established BFOQ for [federal] firefighters at age 55." *Johnson v. Mayor and City Council of Baltimore*, 731 F.2d at 217 (Winter, C.J., dissenting) (Johnson Pet. 14a).

Congress could have, but chose not to amend the ADEA to specifically establish age 55 as a BFOQ for non-federal firefighters. In 1977, President Carter recommended to the 95th Congress that it carefully consider amending the ADEA to set a designated retirement age of less than 70 for occupations in which age is an important indicator of job performance. The 95th Congress amended the ADEA and did not establish any specific mandatory retirement age for non-federal firefighters. At the same time, however, Congress decided to retain the mandatory retirement ages it had established for federal firefighters.

4. Other federal courts which have considered the relevance of federal mandatory retirement statutes to the ADEA's BFOQ exception, have held that those statutes *do not establish*, as a matter of law, that age 55 is a BFOQ under the ADEA for comparable employees.

5. Congress has declared a strong federal interest in protecting the rights of older Americans and in prohibiting employment decisions based on unwarranted assumptions and age stereotypes. Thus, the ADEA requires that the state achieve its goals in a "more individualized and careful manner." *E.E.O.C. v. Wyoming*, 460 U.S. at 230. The only way in which this statutory purpose can be effected is through the application of the two-prong evidentiary BFOQ test. Reliance on unsubstantiated and unreviewed mandatory retirement ages established by Congress for federal employees is totally impermissible.

ARGUMENT

THE FEDERAL CIVIL SERVICE RETIREMENT STATUTE, 5 U.S.C. § 8335(b), WHICH AUTHORIZES THE INVOLUNTARY RETIREMENT OF *FEDERAL* FIREFIGHTERS AT AGE 55, DOES NOT ESTABLISH *AS A MATTER OF LAW* THAT AGE 55 IS A BFOQ UNDER THE ADEA FOR *NON-FEDERAL* FIREFIGHTERS NATIONWIDE.

A. The ADEA Requires The Satisfaction Of An Evidentiary Test To Establish The Existence Of A BFOQ.

Congress has declared that the purpose of the ADEA is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621. Although the Act prohibits employers from relying solely upon age as a measure of individual ability, the Act permits the use of age as an employment criteria where age is a BFOQ reasonably necessary to the normal operation of the particular business. 29 U.S.C. § 623(f)(1).

It continually has been recognized by the courts that the BFOQ exception to this remedial statute is an affirmative defense which is to be strictly construed and narrowly applied. *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982); *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, *reh. denied*, 582 F.2d 966 (5th Cir. 1978). *Cf. Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974) (exceptions to Equal Pay Act). The employer asserting such an exception must prove "plainly and unmistakeably" that its actions meet the terms and spirit of the provision. *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). As the Seventh Circuit explained in *Orzel v. City of Wauwatosa*, 697 F.2d 743 (7th Cir. 1983) *cert. denied* ___ U.S. ___, 104 S. Ct. 484 (1984):

> Because the BFOQ exception frees an employer from the ADEA's general requirement of making individualized judgments regarding the ability of older workers, overuse of the exception involves the risk of reintroducing on a broad scale, the very age stereotyping the ADEA was designed to prevent.

697 F.2d at 748.

The clear mandate of Congress in enacting and subsequently in amending the ADEA to broaden its scope and prohibitions, requires that any age-based criteria be justified by facts, not by stereotypical assumptions about the ability of older workers to perform their jobs. Accordingly, in the House report accompanying the legislation that ultimately became the ADEA, Congress stated that:

> The case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions.

H.R. Rep. No. 805, 90th Cong., 1st Sess. (Oct. 23, 1967) at 7. Similarly, the House report on the bill which became the 1978 amendments to the ADEA, addressed the issue of BFOQ in so-called hazardous occupations, explaining that:

> In most cases, more important than the possible decline in capabilities experienced with age is the fact that this decline varies with individuals as to age and intensity, varies in importance to particular jobs and may be compensated for by other attributes which often increase by age, for example, experience and judgment.

H.R. Rep. No. 95-527 pt. 1, 95th Cong., 1st Sess. (July 25, 1977) at 12. Thus, a factual analysis is necessary to establish that a BFOQ exists for a particular job, whether the position under scrutiny is law enforcement, firefighting or sedentary.

As of present date, this Court has not established the test to be applied in determining the existence of an age-based BFOQ. The circuit courts, nevertheless, have developed a two-prong test which an employer must meet to establish the BFOQ defense. This test, while neither adopted nor rejected by the Court, has been recognized and cited by its members, *see, e.g.. E.E.O.C. v. Wyoming,* 460 U.S. at 257-58 (Burger, C.J., dissenting).

In *Arritt v. Grisell,* 567 F.2d 1267 (4th Cir. 1977), the Fourth Circuit explained that an employer satisfies the BFOQ test if it establishes:

> (1) That the BFOQ which it invokes is reasonably necessary to the essence of its business . . . and
>
> (2) That the employer has reasonable cause, i.e. a *factual basis* for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it would be impossible or impractical to deal with persons over the age limit on an individual basis.

567 F.2d at 1271 (emphasis added). Virtually every court of appeals to have considered the BFOQ has adopted this standard, which was first promulgated by the Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.,* 531 F.2d 224, 236 (5th Cir. 1976); *E.E.O.C. v. County of Allegheny,* 705 F.2d 679 (3rd Cir. 1983); *Tuohy v. Ford Motor Co.,* 675 F.2d 842, 844 (6th Cir. 1982); *Orzel v. City of Wauwatosa,* 697 F.2d 743, 753 (7th Cir. 1983); *Houghton v. McDonnell Douglas Corp.,* 553 F.2d 561, 564 (8th Cir.), *cert. denied* 434 U.S. 966 (1977); *E.E.O.C. v. County of Santa Barbara,* 666 F.2d 373, 376 (9th Cir. 1982); *Stewart v. Smith,* 673 F.2d 485, 491 n.26 (D.C. Cir. 1982); *Cf.* S. Rep. No. 95-493, 95th Cong. 1st Sess. (1977);[3] 29 C.F.R. § 1625.6 (1981).

[3] The Senate Committee Report on the 1978 Amendments differs to some extent with the second part of the *Tamiami* test.

The courts in applying the established *Tamiami* test have uniformly required an individualized showing that an age restriction is necessary for a particular job, including a job that is hazardous and/or involves public safety. *See Smallwood v. United Air Lines, Inc.*, 661 F.2d at 308 (4th Cir. 1981) (flight engineer); *Orzel v. City of Wauwatosa*, 697 F.2d at 752 (assistant fire chief); *E.E.O.C. v. City of St. Paul*, 671 F.2d 1162, 1166 (8th Cir. 1982) (fire chief); *Tuohy v. Ford Motor Company*, 675 F.2d 842 (6th Cir. 1982) (non-commercial pilot); *Houghton v. McDonnell Douglas*, 553 F.2d at 564 (test pilot); *E.E.O.C. v. County of Santa Barbara*, 666 F.2d at 376-77 (corrections officer); *E.E.O.C. v. County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 984 (1984) (helicopter pilot); *Heiar v. Crawford County, Wisconsin*, ___ F.2d ___, 35 F.E.P. Cases 1458 (7th Cir. 1984) (deputy sheriff); *Aaron v. Davis*, 414 F. Supp. 453 (D. Ark. 1976) (firefighter).

Thus, to avoid liability under the ADEA, both the legislative history and courts instruct that the employer in *all* cases must demonstrate, by objective and credible

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According to the Senate Committee, to establish age as a BFOQ an employer must prove that:

> There may be a factual basis for believing substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, *and* it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employee's capacity or ability to continue to perform the job safely and efficiently.

S. Rep. No. 95-493 (1977) (emphasis added). Thus, the burden of proof on an employer asserting age as a BFOQ is greater under the Senate Committee's test than under the *Tamiami* test. According to the Senate Committee, only upon a clear and convincing showing of the existence of *both* a factual basis for believing substantially all employees over a certain age are unable to perform the job *and* that it is impossible or impractical to test the individual employee's capabilities, may the court find age as a BFOQ.

evidence, that its age-based employment decision qualifies as a BFOQ necessary to the normal operation of the particular business. Each case must be separately adjudicated and resolved on the evidentiary record established at trial. *See Tuohy v. Ford Motor Co.*, 675 F.2d at 845-46 (6th Cir. 1982).

B. The Court Below Misread This Court's Decision In *E.E.O.C. v. Wyoming*.

1. *The Fourth Circuit Misconstrued the Meaning of the "Reasonable Federal Standard" Referred to in E.E.O.C. v. Wyoming.*

The Fourth Circuit's decision in the instant case runs entirely afoul to this two-prong BFOQ test. The court, in essence, carved out an exception to this test and explained that it is not necessary to apply the required factual analysis in determining whether a BFOQ exists with respect to firefighters. Believing that "(t)he question appears to be the same when raised for firefighters, in San Francisco or in Baltimore," the court explained, "(t)he situation may not fit the intended accommodation of differing factual circumstances lending themselves to a case-by-case resolution." 731 F.2d at 215 (Johnson Pet. 10a). Rather, the Fourth Circuit explained that in light of the decision in *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983), where this Court stated that "the State's discretion is merely being tested against a reasonable federal standard," 460 U.S. at 240, the courts now "must initiate a search for a 'reasonable federal standard' by which to test whether age is a bona fide occupational qualification for the City of Baltimore's firefighters." 731 F.2d at 212 (Johnson Pet. 5a). The Fourth Circuit then held that Congress made its search a simple one, by providing the standard. Relying on the federal retirement statute for law enforcement and firefighting employees of the federal government, 5 U.S.C. § 8335(b), which mandates re-

tirement for federal firefighters and various other federal employees at age 55, the Fourth Circuit concluded that Congress has established a "reasonable federal standard by which to measure firefighting in the City of Baltimore." 731 F.2d at 215 (Johnson Pet. 6a). Thus, the panel majority observed that Congress has legislatively answered the question that age 55 is a BFOQ for Baltimore City firefighters as well as all firefighters nationwide.

This conclusion of the Fourth Circuit is totally misplaced. It ignores the clear mandate of the ADEA that the BFOQ exception be adjudicated case-by-case. Furthermore, it reveals a failure to understand and to properly apply this Court's holding in *Wyoming*.

E.E.O.C. v. Wyoming concerned the constitutionality of the 1974 amendments to the ADEA extending the Act's coverage to state and local government employers. The State of Wyoming contended and the district court held that the ADEA impermissibly interfered with integral state governmental functions, and thus, under the doctrine enunciated in *National League of Cities v. Usery*, 426 U.S. 833 (1976), violated the Tenth Amendment to the United States Constitution.[4] *E.E.O.C. v. Wyoming*, 514 F. Supp. 595, 600 (D. Wyo. 1981). On appeal, this Court reversed. The Court held that the extension of the ADEA to state and local governments does not violate the Tenth Amendment, since the ADEA's BFOQ exemption provides an adequate safeguard against any impermissible federal interference. All that the ADEA requires, the Court emphasized, is that the state, in achieving the goals of assuring the physical preparedness of its employees to perform their duties, do so "in a *more individualized and careful manner* than would otherwise be the case." 460 U.S. at 239 (emphasis added). Thus, the state may assess

[4] On February 19, 1985 the Court, in *Garcia v. San Antonio Metropolitan Transit Authority*, ___ U.S. ___, 53 U.S.L.W. 4135 (1985), overruled *National League of Cities v. Usery*.

the fitness of its employees and dismiss those "whom it reasonably finds to be unfit." *Id.* In explaining the scope of the ADEA and the requirement placed on the states under the Act, the Court stated as follows:

> Perhaps more important, Appellees remain free under the ADEA to continue to do precisely what they are doing now, *if they can demonstrate that age is a 'bona fide occupational qualification'* for the job of game warden . . . Thus, in contrast to the situation in *National League of Cities* [citations omitted], even the State's discretion in achieving its goals in a way it thinks best is not being overridden entirely, but is merely being tested against a reasonable federal standard.

460 U.S. at 240 (emphasis added). Accordingly, the Court remanded the case for a full evidentiary trial to test whether mandatory retirement at 55 is a BFOQ for Wyoming state game wardens.

The Fourth Circuit attempted to distinguish the fact pattern in this case from that in *E.E.O.C. v. Wyoming*. The court stated that unlike firefighting, where Congress by enacting 5 U.S.C. § 8335(b) has determined age 55 to be the federal standard at which such employees should retire, there exists no comparable federal statute "insofar as federal game wardens are concerned." 731 F.2d at 213, 215 n.19 (Johnson Pet. 7a, 10a n.19). The federal and Wyoming statutes reveal that this conclusion is factually incorrect.

By statute, game and fish wardens of the State of Wyoming are defined as "law enforcement officers." Wyo. Stat. § 9-3-190(a)(vii) and § 7-2-101 (1977). They are authorized to make arrests and enforce criminal violations of Wyoming game and fish laws. Wyo. Stat. § 23-6-101 (1977). This Court noted that these employees are law enforcement officers of the State of Wyoming. *See E.E.O.C. v. Wyoming*, 460 U.S. at 235, 241 n.15.

EDITOR'S NOTE

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Similarly, federal game wardens are considered "law enforcement officers" as defined in 5 U.S.C. § 8331(20). Like federal firefighters, federal law enforcement officers, including federal game wardens (now classified as "Special Agent (Wildlife)"), must retire at age 55 pursuant to 5 U.S.C. § 8335(b). Thus, contrary to the Fourth Circuit's understanding, there *is* a federal statute governing the mandatory retirement of federal game wardens. Moreover, this is the identical statute and provision which mandates the retirement of firefighters, and which was relied upon by the Fourth Circuit in its conclusion that Congress had legislated a federal standard for the retirement of firefighters, but had not done so for federal game wardens.

The Fourth Circuit's opinion finding a *per se* BFOQ for mandatory retirement of Baltimore City firefighters at age 55, evidences its total failure to understand the Court's analysis in *Wyoming*. This Court never suggested that in each case where an employer raises the BFOQ defense, the court must search *other* federal statutes for some reasonable federal standard against which to scrutinize the age-based decision. Rather, by the statements quoted above and by remanding the *Wyoming* case for a trial on the BFOQ issue, the Court indicated that the ADEA has already established a reasonable federal standard — "the bona fide occupational qualification reasonably necessary to the normal operation of a particular business." 29 U.S.C. § 623(f)(1). Moreover, in accordance with this statutory language and the congressional mandate as expressed in the legislative history, the circuit courts have developed a uniform BFOQ test which is to be applied in the same manner in *all* cases, whether the employees be Wyoming game wardens, Los Angeles helicopter pilots or Baltimore City firefighters. Reliance on any other standard or guideline, including federal civil service retirement statutes for federal employees not covered by the ADEA, without analysis under

the requisite BFOQ test, is impermissible under the ADEA.

2. *This Court in Wyoming Rejected the Argument that Congress Has Established a Per Se BFOQ for Certain State and Local Government Employees.*

The Court in *Wyoming* was fully aware of the federal civil service laws, including 5 U.S.C. § 8335(b), that authorize retirement of certain federal employees before age 70. *See*, 460 U.S. at 243 n.17, 263 (Burger, C.J., dissenting). In its brief to the Court, the primary argument advanced by the State of Wyoming was that the Court should recognize the "federal model" of age 55 for the mandatory retirement of federal law enforcement officers established by Congress in 5 U.S.C. § 8335(b), and should apply that standard when scrutinizing mandatory retirement provisions applicable to comparable employees of state and local governments. Emphasizing that game wardens are law enforcement officers, Wyoming argued that "Congress has never expressed an intent that law enforcement officers be retained in employment until age 70." *See E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983), Brief of Wyoming at 11-14. Rather, the mandatory retirement age of 55 found in 5 U.S.C. § 8335(b) is a "statement of Congressional policy," Wyoming explained, and should be given due deference. Moreover, Wyoming urged that "if it is reasonable for Congress to require law enforcement officers to retire at age 55, it is not 'arbitrary' for the states to do the same." *Id.* at 16.

The Court considered and rejected Wyoming's contention that 5 U.S.C. § 8335(b) established a federal standard governing the mandatory retirement of all non-federal law enforcement officers. The Court stated in footnote 17, the following:

> We note, incidentally, that the strength of the federal interest underlying the [ADEA] is not

> negated by the fact that the federal government happens to impose mandatory retirement on a small class of its own workers. . . . Once Congress has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that declaration and must from that point on evaluate the sufficiency of the federal interest as a matter of law rather than of psychological analysis.

460 U.S. at 242-43 n.17.

In his dissenting opinion below, Chief Judge Winter noted the significance of footnote 17 and explained, "*Wyoming* . . . tells us that the broad requirements of the ADEA are not to be constricted as a matter of law by what treatment Congress has afforded it to comparable federal employees. Stated otherwise, the fact that Congress may require some federal firefighters to retire at age 55 does not excuse Baltimore from proving the facts necessary to satisfy 29 U.S.C. § 623(f)(1) [BFOQ]." 731 F.2d at 218 (Winter, C.J., dissenting) (Johnson Pet. 15a). Similarly, in *E.E.O.C. v. County of Los Angeles,* 706 F.2d 1039 (9th Cir. 1983), the Ninth Circuit, referring to footnote 17, noted that this Court considered and rejected the contention that mandatory retirement age for federal government employees is equally applicable to state and local government employees in similar occupations. 706 F.2d at 1041-42. *See also E.E.O.C. v. Commonwealth of Pennsylvania,* ___ F. Supp. ___, 36 F.E.P. Cases 234, 238-39 (M.D. Pa. 1984). Significantly, the Fourth Circuit majority failed to even acknowledge, let alone attempt to reconcile footnote 17 of the *Wyoming* decision.

Accordingly, the *Wyoming* case was remanded for a full evidentiary trial on the issue of whether age 55 is a BFOQ for Wyoming's game wardens. In so doing, the Court indicated that the retirement statute for federal "law

enforcement officers," 5 U.S.C. § 8335(b), did not establish a *per se* BFOQ for their state and municipal counterparts. Otherwise, a remand would have been unnecessary. *Walston v. School Board of City of Suffolk,* 566 F.2d 1201, 1205 (4th Cir. 1977); *Cherokee Nation v. State of Oklahoma,* 461 F.2d 674, 676-78 (10th Cir.), *cert. denied* 409 U.S. 1039 (1972).

C. Neither The Text Nor Legislative History Of 5 U.S.C. § 8335(b) And Of The ADEA Supports The Conclusion That Age 55 Is A BFOQ Even For Federal Firefighters.

As explained above, a specific mandatory retirement age is deemed to be a BFOQ under the ADEA only where it can be demonstrated that at a certain age firefighters as a group can no longer be relied upon to safely and efficiently perform their jobs. The Fourth Circuit held that age 55 is a BFOQ for all firefighters *nationwide,* since Congress has determined that federal firefighters must retire at age 55. The court stated as follows:

> Where Congress itself has deemed age to be a *bona fide* occupational qualification for federal firefighters we perceive no justification for ignoring the Congressional mandate in ascertaining 'a reasonable federal standard' by which to measure firefighting in the City of Baltimore. Both federal and city firefighters are engaged in extremely stressful and hazardous activities designed to promote public safety. Absent a determination that age, specifically no more than fifty-five as a general rule, is a *bona fide* occupational qualification for firefighters, we would be compelled to conclude that Congress, in authorizing the automatic retirement of federal police and firefighting personnel, adopted an occupational qualification that is not, or might not be, *bona fide.* A court should not lightly make such a determination as to Congressional purpose.

731 F.2d at 212-13 (Johnson Pet. 6a). This conclusion, however, reveals the failure of the Fourth Circuit to understand both that mandatory retirement ages for federal firefighters and law enforcement officers are not required to satisfy the ADEA's BFOQ requirements, and the statutory scheme of the federal retirement provisions. Furthermore, the legislative history of 5 U.S.C. § 8335(b) does not support the lower court's conclusion that Congress reached any determination whatsoever that age 55 is BFOQ for federal firefighters.

1. *Statutory Scheme of 5 U.S.C. § 8335(b)*

Initially, it must be remembered that mandatory retirement schemes approved by Congress for federal employees are not subject to the strict requirements of the ADEA. The federal employee compulsory retirement schemes need only be rationally related to a permissible government objective, and must not be so unreasonable as to constitute an arbitrary and capricious exercise of legislative power. *Vance v. Bradley,* 440 U.S. 93 (1979); *Stewart v. Smith,* 673 F.2d 485 (D.C. Cir. 1982); *Starr v. Federal Aviation Administration,* 589 F.2d 307 (7th Cir. 1978). In contrast, as the Seventh Circuit explained in *Orzel v. City of Wauwatosa,* 697 F.2d 743 (7th Cir. 1983), to pass muster under the ADEA, compulsory retirement schemes for state and local government employees must not only be rationally related, but must also be "reasonably necessary" to the operation of the particular business in question. 697 F.2d at 749. Thus, "an employer seeking to justify its mandatory retirement age as a valid BFOQ must satisfy a much more stringent evidentiary test than the mere rationality requirement imposed on federal retirement schemes." 697 F.2d at 749-50. Accordingly, in *Orzel,* the court properly concluded that the fact that Congress has determined that age 55 is an appropriate retirement age for one group of firefighters who are not protected by the ADEA's requirements, does not automatically establish that same retirement age is a valid BFOQ for a wholly different group of employees who are covered under the ADEA. 697 F.2d at 750. *See also E.E.O.C. v. County of Los Angeles,* 706 F.2d at 1041. (Congress, in establishing certain age restrictions applicable to federal employees, created an exception to the ADEA, and no BFOQ is necessary to justify the maximum age entry requirements for federal law enforcement officers). *Mahoney v. Trabucco,* 738 F.2d 35, 40-41 (1st Cir. 1984), *cert. denied,* ___ U.S. ___, 53 U.S.L.W. 3403 (1984) (Congress need not adhere to ADEA standards in setting mandatory retirement ages for federal personnel); *E.E.O.C. v. Commonwealth of Pennsylvania,* ___ F. Supp. ___, 36 F.E.P. Cases at 238-39 (M.D. Pa. 1984).

The text of the federal retirement statute does not support the Fourth Circuit's conclusion that Congress reached any finding that age 55 constitutes a BFOQ for *federal* firefighters. Under § 8335(b), a federal firefighter is to retire at age 55 only if he has completed 20 years of service. If he has not, he may remain in the federal fire service beyond age 55, until he has completed 20 years. The federal statute provides that the agency head may retain a federal firefighter until he becomes 60 years of age, and further, that the President may exempt an employee from automatic separation under § 8335(b) when he determines the public interest so requires. 5 U.S.C. § 8335(d). Finally, a federal firefighter may be required to work beyond age 60 if his agency head fails to give him the 60 days' notice of separation, or if he has not completed 18 years of service as required by § 8336(c)(2).

Thus, as Chief Judge Winter observed in his dissenting opinion below, this statutory scheme "makes it impossible . . . to say that there is a federally established BFOQ for firefighters at age 55." 731 F.2d at 217 (Johnson Pet. 14a). Rather, the opposite is true — the statute is a Congressional acknowledgement that firefighters can safely

and efficiently perform beyond the prescribed mandatory retirement age of 55, and can be dealt with on an individual basis.

2. *Legislative History of 5 U.S.C. § 8335(b)*

The legislative history of 5 U.S.C. § 8335(b) does not support a conclusion that Congress, in establishing the mandatory retirement age for federal firefighters and law enforcement officers, reached any finding that age 55 constituted a BFOQ for these occupations. The Senate Report accompanying the bill which eventually became 5 U.S.C. § 8335(b), revealed a congressional intent to liberalize retirement provisions so as to make it feasible for federal firefighters and law enforcement officers to retire at age 50. The report acknowledged that this intent was based on the vigorous demands of these positions which are "far more taxing than most in the Federal Service." S. Rep. No. 93-948, 93rd Cong. 2nd Sess. (1974). "Older employees in these occupations," the report concluded, "should be *encouraged* to retire." *Id.* (emphasis added).

Chief Judge Winter noted in his dissenting opinion below that "it must be remembered, however, that this language was used in relation to *voluntary* retirement, not *involuntary* retirement, as Baltimore City requires." 731 F.2d at 217. (Johnson Pet. 14a) (emphasis in original). With respect to involuntary retirement, the report states that "the bill provides for mandatory retirement of an *eligible* employee at age 55 or after 20 years, whichever occurs *later*." S. Rep. No. 93-948 (emphasis added), Chief Judge Winter properly concluded, therefore, that "the legislative history, with its emphasis on 'eligible' employee and resort to an alternative formula under which an employee may not be required to retire until he has completed 20 years of service, belies the existence of congressional intent, perceived by the majority, to fix age

fifty-five as a BFOQ." 731 F.2d at 217-18 (Johnson Pet. 14a).

The preservation of these mandatory retirement provisions for certain federal employees, moreover, was the product of an agreement to provide the congressional committee having jurisdiction over the retirement programs with the opportunity to review these provisions, particularly since most were part of liberalized retirement programs. *Vance v. Bradley*, 440 U.S. at 97 n.12 (1979). During the consideration of the 1978 amendments to the ADEA in the House, Representative Spellman offered an amendment on behalf of the House Post Office and Civil Service Committee:

> To continue in effect those mandatory retirement provisions which are applicable to specific civil service occupations such as air traffic controller, law enforcement officer and firefighter.
>
> * * * * * *
>
> I hasten to point out that this amendment does not indicate opposition perse [sic] to elimination of mandatory retirement for air traffic controllers, firefighters, and other specific occupations.
>
> However, since most of these mandatory retirement provisions are part of the liberalized retirement program, our committee believes that such provisions should not be repealed until the individual retirement programs have been reexamined.

123 Cong. Rec. 30556 (1977).

Representative Hawkins, in agreeing to this amendment offered by Representative Spellman, stated:

> By this action we are not reaffirming the mandatory retirement ages in the statutes applicable to these positions. The sole purpose of this agreement is to afford the committees the opportunity to review these statutes.

Id.

It is clear that Congress did not intend § 8335(b) to operate as a legislative BFOQ for the federal personnel governed by that section, much less their state or municipal counterparts. Rather, the very existence of § 8335(b) is being tolerated by Congress, pending committee review, because its mandatory retirement provisions are integrally related to "liberalized retirement programs" for the federal personnel affected. In fact, a number of federal agencies reviewing these mandatory retirement schemes have raised serious questions concerning their continued viability. *See* discussion *infra* at 35.

As the legislative history demonstrates, there may be any number of reasons why Congress chose to retain the mandatory retirement age for certain federal employees. It cannot be assumed, therefore, that Congress applied a BFOQ analysis, or that its reasons would withstand BFOQ scrutiny, or that it intended, in some way, to limit its federal interest in prohibiting age discrimination with respect to certain non-federal employees. This Court should not read "into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in . . . [its] declaration of the strong federal interest underlying the ADEA." 460 U.S. at 242-43 n.17. The only way that the BFOQ requirement can be satisfied, therefore, is through a factual scrutiny of the particular job in question, under the two-prong *Tamiami* test.

3. *Congress Could Have, But Chose Not to Amend the ADEA to Set Age 55 as a BFOQ for Non-Federal Firefighters Covered by the Act.*

In 1974, the 93rd Congress extended the ADEA to state and local governments, including firefighting and law enforcement employees of those employers. That same

93rd Congress, a few months later, enacted 5 U.S.C. § 8335(b), establishing the mandatory retirement age of 55 or 20 years of service for *federal* firefighters. Clearly, Congress could have modified the ADEA at that time to provide a similar exemption for non-federal personnel, but chose not to do so.

In 1977 and 1978, Congress again considered proposed amendments to the ADEA. One of the changes suggested by President Jimmy Carter was to establish a mandatory retirement age of less than 70 for certain occupations. In a letter dated September 23, 1977 to Senator Harrison A. Williams, Chairman of the Senate Labor Subcommittee, which was considering amendments to the ADEA, President Carter stated:

> There are two matters which I would urge the committee to consider carefully.
>
> First, I believe it is important that the legislation clearly permit the establishment of a designated retirement age less than age 70 where age has been shown to be an important indicator of job performance. Certain types of law enforcement activities and air traffic control are frequently mentioned as examples.
>
> . . . .

U.S. Department of Labor, Employment Standards Administration, *Age Discrimination in Employment Act of 1967: A Report Covering Activities Under the Act During 1977 Submitted to Congress in 1978 in Accordance with Section 13 of the Act,* Appendix B, A-7 (June 14, 1978). Although Senator Williams advised Congress of this request of President Carter, *see* 123 Cong. Rec. 34296 (1977) (Remarks of Senator Harrison Williams), it was never adopted by the Congress.

The ADEA was amended in 1978 and for the first time Congress made it unlawful to involuntarily retire employ-

ees regardless of whether or not their compulsory retirement is pursuant to a bona fide employee benefit plan. Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978); *Compare* 29 U.S.C. § 623(f)(2) (1967) *with* 29 U.S.C. § 623(f) (1978). At the same time, Congress retained the mandatory retirement provisions for certain federal employees, including 5 U.S.C. § 8335(b) covering federal firefighters. *See* discussion of legislative history regarding this retention of federal mandatory retirement provisions at 23, *supra*. Furthermore, and most significant, Congress once again did not write any exemption into the ADEA for firefighters employed by state and local governments, nor did it set age 55 as a general mandatory retirement age for these employees, as it had done and had reaffirmed for their federal counterparts. This is despite the fact that a Presidential recommendation that it do so was before the Congress. Rather, Congress chose to leave in the law, unchanged, the existing BFOQ exemption it had established in 1967 under the original ADEA. The BFOQ standard was now the *only* means by which mandatory retirement provisions could be declared lawful under the ADEA. *See Trans World Airlines, Inc. v. Thurston*, ___ U.S. ___, 105 S. Ct. 613, 623 (1985) for discussion of legislative history regarding applicability of existing BFOQ provision to the 1978 mandatory retirement amendment.

Congress' failure to eliminate mandatory retirement provisions for federal firefighters provides no basis for assuming that these provisions establish age 55 as a BFOQ for state and local firefighters, or for discounting the significance of the federal interest in prohibiting arbitrary age discrimination. Furthermore, there is no warrant for reading into the ADEA, exemptions which were before Congress, and which could have been provided, but which Congress chose not to so provide. *Cf. Lehman v. Nakshian*, 453 U.S. 156 (1981) (where

Congress expressly provided for jury trials in section of ADEA applicable to non-federal employees, jury trial not available under ADEA to federal employees).

D. The Fourth Circuit's Federal Standard/*Per Se* BFOQ Theory Has Been Uniformly Rejected By Other Federal Courts.

The only other courts to consider the relevance of federal mandatory retirement statutes to the ADEA's BFOQ exception, have held that the the former *does not establish*, as a matter of law, a BFOQ under the ADEA for comparable employees. *Orzel v. City of Wauwatosa*, 697 F.2d 743 (7th Cir. 1983); *E.E.O.C. v. County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983); *Heiar v. Crawford County, Wisconsin*, ___ F.2d ___, 35 F.E.P. Cases 1458 (7th Cir. 1984); *E.E.O.C. v. Commonwealth of Pennsylvania*, ___ F. Supp. ___, 36 F.E.P. Cases 234 (M.D. Pa. 1984), *Cf. E.E.O.C. v. Missouri State Highway Patrol*, ___ F.2d ___, 36 F.E.P. Cases 401 (8th Cir. 1984).

In *Orzel*, an assistant fire chief challenged the City's action in terminating his employment upon reaching age 55, the mandatory retirement age for all "protective service" employees. The city contended that its policy was proper in that Congress could not possibly have intended to prohibit state and municipal employers from adopting age 55 as a mandatory retirement age for local firefighters while, at the same time, authorize compulsory retirement for federal firefighters at age 55. The Seventh Circuit rejected this argument. The court explained that the compulsory retirement schemes scrutinized under the ADEA must be "reasonably necessary" to the operation of the particular business in question. Thus, the court concluded, "an employer seeking to justify its maximum retirement age as a valid BFOQ, must satisfy a much

more stringent evidentiary test than the mere rationality requirement imposed on federal retirement schemes." 697 F.2d at 749-50.

The Seventh Circuit once again addressed this issue in *Heiar v. Crawford County, Wisconsin,* and reaffirmed its conclusion in *Orzel.* The court explained that the federal standard/*per se* BFOQ theory was invalid on two additional grounds. First, the court noted that the statutory scheme of 5 U.S.C. § 8335(b) cannot accurately be described as *requiring* retirement at age 55, since the federal employees, for any number of reasons, may continue working after reaching age 55. 35 F.E.P. Cases at 1464. Second, "to make the fact that the federal government has imposed a mandatory retirement age on its own employees *conclusive* on the question whether such a retirement age is reasonable for state or local officers having similar duties," the court emphasized, "would apply section 8335(b) far beyond its scope — would make a statute applicable only to federal officers applicable in effect to state and local officers as well." *Id.* (emphasis added).

Similarly, the County of Los Angeles attempted to justify its maximum hiring age for helicopter pilots in its sheriff and fire departments by contending that age was a BFOQ and by arguing that any age-related restrictions tolerated in federal occupations should apply equally to similar state and local occupations. *E.E.O.C. v. County of Los Angeles,* 706 F.2d at 1041. The Ninth Circuit dismissed this contention on three grounds. First, concurring with the theory expressed by the Seventh Circuit in *Orzel,* the court explained that Congress, in establishing certain age restrictions applicable to federal employees, created an exception to the ADEA and no BFOQ was necessary to justify the maximum age entry requirements for *federal* law enforcement officers. 706 F.2d at 1041, *citing Stewart v. Smith,* 673 F.2d 485 (D.C. Cir. 1982).

Second, quoting both footnote 17 of this Court's decision in *Wyoming,* and Chief Justice Burger's dissent, the Ninth Circuit recognized that in *E.E.O.C. v. Wyoming,* this Court considered and rejected the county's argument that age-related restrictions tolerated in federal occupations should apply equally to similar state and local occupations. Third, the court emphasized that "a factual foundation is necessary to establish that age is a BFOQ. . . . courts cannot assume, in the absence of any evidence as to its effects on performance, that age, *per se,* constitutes a BFOQ." 706 F.2d at 1042, *quoting E.E.O.C. v. County of Santa Barbara,* 666 F.2d 373, 376, 377 (9th Cir. 1982). *See also E.E.O.C. v. Commonwealth of Pennsylvania,* 36 F.E.P. Cases at 238-39.

In *Tuohy v. Ford Motor Company,* 675 F.2d 842 (6th Cir. 1982) the Sixth Circuit expressly rejected the district court's conclusion that the Federal Aviation Administration's (FAA) "Age 60 Rule," requiring the retirement of commercial pilots at age 60, was a *per se* BFOQ for non-commercial pilots, preempting further evidentiary inquiry into the reasonable necessity of Ford's analogous mandatory retirement scheme. The Sixth Circuit explained as follows:

> "The presence of an overriding safety factor might well leave a court to conclude as a matter of policy that the level of proof required to establish the reasonable necessity of a BFOQ is relatively low. However, this is quite different from dispensing with the requirement of necessity and holding that a BFOQ has been established as a matter of law because adoption [by another body] of a rule based on age was reasonable." 675 F.2d at 845 (citations omitted).

Accordingly, the court remanded the case for trial on the issue of whether safety considerations render an Age 60 rule for the employer's pilots reasonably necessary. The

court explained that to establish the reasonable necessity, the employer must present a factual basis for its determination that medical science cannot predict, on an individual basis, the likelihood that a pilot who has reached age 60 will become incapacitated during flight, and that there is a factual basis for believing that all pilots over age 60 are unable to perform their duties safely. 675 F.2d at 846.[5]

[5] *Gathercole v. Global Associates*, 727 F.2d 1485 (9th Cir. 1984) does not establish that the FAA Age 60 rule is a *per se* BFOQ for non-commercial pilots. In that instance, the court held that an employer properly relied on the Age 60 rule in involuntarily retiring its pilots at age 60. Although the pilots were not covered by the rule, the contract between their employer and the U.S. Army, for whom the employer provided the pilots' services, *required* that the employer adhere to the Age 60 rule. The court explained that neither the employer nor the Army was in any position to question the applicability and soundness of or evidentiary support for the FAA regulation. Moreover, the court emphasized and seemed to be persuaded by the fact that if the employer were not permitted to mandatorily retire employees at age 60, it would be placed in an "unjust dilemma — either to break its contractual promise to the government . . . or to fail in its obligation to obey a statutory command of the government." 727 at 1488. "To cap the matter," the court explained, the Department of Labor regulations interpreting the BFOQ exception under the ADEA, 29 C.F.R. § 860.102, state that federal statutory and regulatory requirements which provide for compulsory retirement are examples of a "possible" BFOQ. 727 F.2d at 1488.

First, the soundness of the court's decision is highly questionable, for its reliance on the Department of Labor regulations is completely misplaced. On September 27, 1981, the EEOC promulgated new regulations which superceded and effectively rescinded the Department of Labor regulations, including 29 C.F.R. § 860.102. *See* 46 F.R. 47724 (1981). The Labor Department regulations may no longer be relied upon. *Id.* Moreover, the EEOC regulations deleted the "examples" of possible BFOQ's (including the federal statutory and regulatory requirement example) from its explanation of BFOQ under the ADEA. The EEOC explained that the examples "were deleted to avoid the appearance that those examples had received the imprimatur of the Commission. Most notable in this regard is the controversial age-60 rule of the FAA." *Id.* at 47725.

The Eighth Circuit's opinion in *E.E.O.C. v. Missouri State Highway Patrol*, ___ F.2d. ___, 36 F.E.P. Cases 401 (8th Cir. 1984), does not support the Fourth Circuit's *per se* BFOQ theory. That case involved, among other things, a challenge to the state statute requiring uniformed highway patrol officers to retire at age 60. The court extensively analyzed the evidence presented at trial concerning the nature and duties of the positions in question, as well as the substantial expert testimony relating to the effects of age on one's ability to perform the job and whether tests were available which could measure, with reasonable accuracy, an individual's ability and his risks. 36 F.E.P. Cases at 403-08. The court concluded that the Missouri State Patrol had established that there is a factual basis for believing that substantially all patrol members over age 60 lack sufficient aerobic capacity to perform their duties safely and efficiently, and that testing could not adequately distinguish among individuals over 60. Accordingly, the mandatory retirement age was found to be a BFOQ. 36 F.E.P. Cases at 407-08.

In passing, the court noted that it found "persuasive" that Congress has authorized a general mandatory retirement age of 55 for federal law enforcement officers.

Second, it is highly doubtful that the court intended this decision to be a revision of its holding in *EEOC v. Los Angeles*. That case, decided less than one year prior, was never mentioned nor referred to by the court in *Gathercole*.

Moreover, this decision is distinguishable from the situation involved herein. It involves an employer's reliance on an administrative rule which was specifically promulgated to cover *private* commercial pilots who are covered by the ADEA. Thus, to pass muster under the Act, the FAA Age 60 rule must be reasonably necessary to the operation of the particular business; the court assumed that the FAA had sufficient evidence to meet this standard. In contrast, the federal retirement statute, 5 U.S.C. § 8335(b), need only be rationally related to a legitimate government purpose, and its mandatory retirement age does not have to constitute a BFOQ.

Like Congress, the court asserted, the State of Missouri has a valid concern in maintaining a youthful and vigorous law enforcement staff. The court, however, never stated that the federal mandatory retirement statutes establish conclusively and as a matter of law that age 55 is a BFOQ for Missouri highway patrol officers, as the Fourth Circuit had found they did with respect to Baltimore City firefighters. If the Eighth Circuit had reached such a conclusion, there would have been no need for the court to scrutinize the evidentiary record established at trial and to apply the two-prong *Tamiami* test in order to reach its holding that age 60 was a BFOQ for the state patrol officers.

E. Applying The Two-Prong Evidentiary BFOQ Test Is Consistent With The Overriding Federal Interest In Abolishing Unwarranted Age Stereotyping And Discrimination, And With The Congressional Mandate That The ADEA Be Adjudicated On A Case-By-Case Basis.

During the 1977-78 congressional debate on the proposed amendments to eliminate from the ADEA the mandatory retirement exceptions, Senator Jacob K. Javits, the ranking minority member of the Senate Labor Subcommittee, explained that the committee believed that the established BFOQ exemption sufficiently protected employers who sought to enforce legitimate mandatory retirement rules. Acknowledging the two-prong BFOQ test, and reading from the Senate committee report, Senator Javits stated as follows:

> The committee intends to make clear that under this legislation an employer would not be required to retain anyone who is not qualified to perform a particular job. For example, in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.

123 Cong. Rec. 17299 (1977) (Remarks of Senator Jacob K. Javits). Further, noting that while an employer may seek guidance from the agency administering the Act (then the Department of Labor) as to whether its mandatory retirement scheme is a valid BFOQ, Senator Javits stated that the courts are the last resort in any disagreement over the applicability of the BFOQ exception. *Id.* The Senator's remarks, therefore, indicate that Congress had not established any definite age as a BFOQ for any position covered by the ADEA. Rather, resort to the BFOQ test and a separate adjudication is required in *all* cases, regardless of the specific occupation for which the BFOQ is sought. *See* pp. 9-13, *supra*. Furthermore, the court should examine only the particular facts of the case before it. *E.E.O.C. v. County of Santa Barbara,* 666 F.2d 373; *Stewart v. Smith,* 673 F.2d at 491 n.26.

Such a factual approach in evaluating a purported BFOQ is consistent with the statutory scheme and must be followed. Congress has declared a strong federal interest in protecting the rights of older Americans and in abolishing subjective and unwarranted assumptions that older persons are unable to adequately perform. *E.E.O.C. v. County of Santa Barbara,* 666 F.2d at 378 n.8; *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3rd Cir. 1977), *cert. denied*, 439 U.S. 821 (1979). The key to the ADEA statutory scheme is that the *individual's* abilities rather than age, stereotypes, or generalizations, are to be considered in making decisions effecting his employment. Thus, a factual foundation is necessary to establish a BFOQ. To simply conclude, as the lower court did, that

since Congress has selected age 55 to be the retirement age for federal firefighters, age 55 is therefore a BFOQ for non-federal firefighters, without any evidentiary scrutiny to determine whether age 55 is in fact a BFOQ, runs entirely afoul to the entire purpose of the Act. The result of such an approach would be to "reintroduc[e] on a broad scale, the very age stereotyping the ADEA was designed to prevent." *Orzel v. City of Wauwatosa,* 697 F.2d at 748.

In his dissenting opinion in *Wyoming*, Chief Justice Burger recognized that there are no statutory guidelines to explain what constitutes a BFOQ, and as a result, the courts have established the two-prong *Tamiami* test. 460 U.S. at 257-258 (Burger, C.J., dissenting). The Chief Justice, however, expressed concern with the BFOQ defense because "(g)iven the state of modern medicine, it is virtually impossible to prove that *all* persons within a class are unable to perform a particular job or that it is impossible to test employees on an individual basis." 460 U.S. at 258 (emphasis added).

There is no need for this concern, however; for if medical science has developed to such an extent that employees can be tested *individually* to ascertain their ability to work beyond the prescribed mandatory retirement age and to identify those who pose risks, then the proper balance between the public employer's interests and the employees' interests has been struck under the ADEA. The state's interests are not impaired, since "it may still, at the very least, assess the fitness of its [employees] and dismiss those [employees] who it finds to be unfit." 460 U.S. at 239. In fact, if modern medicine is so sophisticated, then the state would be able to make its employment decisions based on empirical facts, rather than on generalized assumptions that all individuals over a certain age are unable to perform and must be retired. This is precisely what Congress intended and what the ADEA requires — that the state "achieve its goals in a more individualized

and careful manner than would otherwise be the case, but it does not require the state to abandon its goals or to abandon the policy decisions underlying them." *Id.*

Significantly, many of the federal government agencies reviewing the mandatory retirement provisions applicable to federal firefighters and law enforcement officers have seriously questioned the wisdom of retaining such provisions. *See* J.A. 13-15. A Government Account Office (GAO) report prepared by the Comptroller General and entitled *Special Retirement Policy for Federal Law Enforcement and Firefighter Personnel Needs Reevaluation,* (1977), criticized the age restrictions in the federal government and suggested alternatives, such as individualized testing. (J.A. 13-14). The report, citing statistics, indicated that many firefighters work beyond the mandatory retirement age without significant effect on their employment. (J.A. 14). The GAO concluded that if an employee becomes physically unable to continue performing his or her job, the employee should be retired according to accepted disability practices that operate on a case-by-case determination. (J.A. 14). The Office of Personnel Management (OPM), in its report, *Staff Paper on the Early Retirement Policy for Federal Law Enforcement and Firefighter Personnel,* also questioned the need for a preferential early retirement plan for federal law enforcement and firefighter personnel. The OPM emphasized that the early retirement plan resembles disability retirement, but the individual employee is not required to show any disability. (J.A. 14-15). The report "cautiously" recommended retaining the program but with more specific criteria based on job-related physical requirements. (J.A. 15). Finally, and most noteworthy, both the United States Fire Administration and the Law Enforcement Assistance Administration have found individualized testing to be both possible and desirable. (J.A. 15).

The EEOC reviewed these and other studies to determine whether it should issue regulations allowing state and local governments to use maximum entry-level age restrictions and mandatory retirement for police and firefighters. (J.A. 5-23). An extensive internal EEOC memorandum, dated August 14, 1980, found that while higher than average physical fitness standards are necessary for police and firefighters, tests are available to adequately measure the physical requirements of the job. (J.A. 18). The memorandum further explained:

> In sum, statistics appear to be available that can rebut assertions that there are stringent physical demands for police and firefighters that mandate age restrictions. The current physical fitness levels, often tested, and the lack of uniformity among state and local governments provide data that substantiate the claim that many older people are physically capable of performing the duties of the various law enforcement and firefighter occupations.

(J.A. 19-20). For the EEOC to offer an exemption to state and local governments, the memorandum concluded, "would be to perpetuate arbitrary limits where individualized testing appears to be a feasible alternative." (J.A. 20).

This lack of uniformity of mandatory retirement ages for firefighters employed by state and local governments, noted in the EEOC memorandum, establishes that age 55 is not a BFOQ for this job. A nationwide survey of state and local fire departments, conducted by Edward C. Heckrotte, Sr., President of Baltimore Firefighters Local 734, IAFF (AFL-CIO) during the periods from 1972-1975 and 1978-1981, and a trustee of Board of Trustees of the FPERS of the City of Baltimore since 1968, revealed the following — 33 departments had no mandatory retirement age whatsoever for firefighters; 29 departments required retirement at age 70; 2 departments mandated retirement

at age 68; 61 departments involuntarily retired their firefighters at age 65; 14 departments mandated retirement between ages 62-64; 27 departments retired employees at age 60. Most significantly, only one department required firefighters to retire at age 55 — that department was Baltimore City, under its FPERS. (J.A. 24-37).

Finally, the statutory scheme of Baltimore City's FPERS reveals that the mandatory retirement ages set forth therein also are not based on any BFOQ determination. While the ordinance requires retirement at age 55 as a general matter, it permits firefighters to continue working (1) until age 60 if they entered the service prior to July 1, 1962, Article 22, § 34(a)(4) Baltimore City Code (J.A. 3), and (2) until age 65 if they have less than 25 years of service. Article 22, § 34(a)(3), Baltimore City Code (J.A. 3). Furthermore, firefighting employees who hold the rank of lieutenant or above are not required to retire until age 65. Article 22, § 34(a)(2), Baltimore City Code (J.A. 3). This is despite the fact that the evidence presented at trial in the district court clearly established that many of these fire officers are actively engaged in fighting fires on the fireground to the same extent as the firefighters (R. 67, 139, 167, 181, 190-91). Lastly, firefighters who, in 1962, chose to remain in the ERS, rather than join the FPERS, need not retire until age *70*. Article 22, § 3(f), Baltimore City Code (J.A. 4). Thus, given these various mandatory retirement ages for employees performing virtually identical jobs and requiring the same fitness and ability, it is impossible to say that age 55 is a BFOQ for Baltimore City's firefighters.

Congress, in amending the ADEA to cover firefighters employed by state and local governments, while, at the same time requiring federal firefighters to retire at age 55 under certain circumstances, chose to subject the non-federal government employers to a different and more

stringent standard. To legally retire firefighters at a specified age, the state or local employer, like any other employer covered by the ADEA, must establish that its mandatory retirement scheme is not just rationally related, but is reasonably *necessary*. This must be accomplished by presenting factual evidence, under the two-prong *Tamiami* test, showing the impact of age on one's ability to perform the tasks required of the position. The Fourth Circuit's reliance on 5 U.S.C. § 8335(b), as establishing age 55 as a BFOQ for Baltimore City firefighters, simply because that statute requires federal firefighters to retire at age 55, is completely misplaced. The court's conclusion was not based on any actual showing that age 55 has been found to be a BFOQ for firefighting, or that Congress *intended* the requirements of § 8335(b) to be applicable to employees covered by the ADEA. Accordingly, the theory that § 8335(b) establishes a *per se* BFOQ for all firefighters nationwide does not pass muster under the ADEA, and must be rejected.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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